

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SAM BIRD, JUDGE

DIVISION IV

CA06-753

APRIL 25, 2007

MERLYN BRYAN PAGE
APPELLANT

APPEAL FROM THE POLK COUNTY
CIRCUIT COURT
[NO. DR2004-0262]

V.

PATRICIA ANN PAGE
APPELLEE

HON. HAMILTON SINGLETON,
CIRCUIT JUDGE SITTING BY
ASSIGNMENT

AFFIRMED

In this divorce case, Dr. Merlyn Bryan Page appeals the Polk County Circuit Court's order dividing the parties' assets and failing to award alimony to him. He argues three points on appeal: (1) that the circuit court abused its discretion in finding that the parties' antenuptial agreement was valid; (2) that the circuit court abused its discretion in failing to award a lot in Florida to him; and (3) that the circuit court abused its discretion in denying his request for alimony. We affirm the circuit court's decision.

Dr. Merlyn Bryan Page and Patricia Ann Page were married on August 8, 1989. Bryan filed for divorce on October 25, 2004, and requested the court to divide the parties' property unequally in his favor. He later asked the court to declare void an antenuptial agreement executed by the parties before their marriage and to award him alimony. Patricia cross-claimed for divorce. After a hearing on October 17, 2006, the circuit court awarded a divorce on

Patricia's counterclaim and held that the antenuptial agreement was valid. In accordance with that agreement, the circuit court awarded to Patricia her non-marital personal and real property, including a house and land on Lake Mena, a condominium in Colorado, the Long Mountain properties, and the Camp Albert Pike cabin. The circuit court also awarded to Patricia a lot in Florida that had been conveyed by Bryan to Patricia in 1993. Finally, the circuit court denied Bryan's claim for alimony, finding that Bryan was "considerably more financially sound" than Patricia. Bryan appealed.

Antenuptial Agreement

For his first point on appeal, Bryan asserts that the circuit court abused its discretion in finding that the antenuptial agreement was valid. Specifically, he claims that he did not consider Mr. Miller, the attorney who drafted the agreement, to be his attorney; that no one explained his rights to him regarding the agreement; and that he was not provided a full and fair disclosure of Patricia's financial situation.

At the time the Pages were married, Bryan was a licensed practicing gynecologist and obstetrician at the Mena Women's Clinic, which he owned. He also had completed two years of law school. Patricia was a lawyer and owned her own law practice in Mena. On August 4, 1989, four days before the Pages were married, they executed an antenuptial agreement. The agreement was drafted by a lawyer in Mena, Danny Miller. At the hearing, Patricia and Bryan disagreed about who contacted Mr. Miller and why. Bryan testified that Patricia suggested the antenuptial agreement. He said that it was "fine" with him but that he did not contact an attorney and did not consider Mr. Miller to be his attorney. He claimed that

Patricia told him that the agreement was at Mr. Miller's office for him to sign. He also testified that no one explained to him his rights regarding the agreement.

Both Patricia and Mr. Miller testified that Patricia's secretary made the initial contact with Mr. Miller. Patricia said that Bryan had experienced a really bad marriage and divorce before they were married, that they both had children from previous marriages, and that, for those reasons, Bryan wanted a prenuptial agreement and wanted to keep all of their finances separate. She testified that she agreed with him. She stated that Bryan asked her to call Mr. Miller for him and set up an appointment. She testified that she never spoke with Mr. Miller, never went to his office, and never considered him to be her lawyer. She understood that he represented Bryan.

Mr. Miller testified that he prepared the agreement for Bryan. Mr. Miller said that he spoke with Bryan by phone on the day that Patricia's secretary contacted him and that Bryan came to his office a few days later. He testified that Bryan told him that his recent divorce had been a bad deal, that he knew Patricia was a good divorce lawyer, and that there were some things he wanted to protect. Mr. Miller testified that the main thing Bryan told him that he wanted to protect was his medical practice. According to Mr. Miller's testimony, Bryan also wanted to protect a car, a grand piano, and an art collection. Mr. Miller indicated that he provided a draft of the agreement to Bryan, who brought it back later with legal descriptions of Patricia's land and the items she wanted protected in the agreement. Mr. Miller said that there was no question in his mind that he was Bryan's attorney and that he never spoke directly with Patricia about the document. He also testified that he asked Bryan if he

understood the agreement and that Bryan said “yes.” He stated further that he asked Bryan if he and Patricia had discussed the property each owned with the other and Bryan said that they had.

The circuit court in this case found that the antenuptial agreement identified Patricia’s real property and the businesses of both parties, and stated that there had been a full and fair disclosure between the parties of the earnings and property of each party. The circuit court also found that the agreement was prepared at Bryan’s direction, that both parties were well educated, were experienced in life, and had been married before. Finally, the court held that the agreement was clear and unambiguous and was not unconscionable.

With respect to the division of property in a divorce case, we review the circuit court’s findings of fact and affirm them unless they are clearly erroneous. *Thomas v. Thomas*, 68 Ark. App. 196, 203, 4 S.W.3d 517, 522 (1999). In addition, we will enforce an antenuptial agreement where the agreement was freely entered into by both parties and is not unjust, inequitable, or tainted with fraud. *Banks v. Evans*, 347 Ark. 383, 64 S.W.3d 746 (2002); *Faver v. Faver*, 266 Ark. 262, 583 S.W.2d 44 (1979). A premarital agreement is not enforceable if the party against whom enforcement is sought proves either (1) that he did not execute the agreement voluntarily or (2) that the agreement was unconscionable when it was executed and he was not provided a fair and reasonable disclosure of the property or financial obligations of the other party; he did not waive, in writing after consultation with legal counsel, the right to this disclosure; and he did not have, or reasonably could not have had, adequate knowledge

of the property or financial obligations of the other party. Ark. Code Ann. § 9-11-406 (Repl. 2002).

We do not find the circuit court's decision upholding the validity of the agreement to be clearly erroneous. First, both Patricia and Mr. Miller testified that the agreement was drafted upon Bryan's request, and both considered Mr. Miller to be Bryan's lawyer. Patricia and Mr. Miller both testified that they had never spoken about the agreement, and Bryan did not dispute this. While Bryan testified that he did not consider Mr. Miller to be his attorney, the circuit court chose to believe the testimony of two other witnesses. This conflicting testimony was for the circuit court to resolve, and we give due deference to its superior position to determine the credibility of witnesses and the weight to be given their testimony. *See, e.g., Skokos v. Skokos*, 344 Ark. 420, 40 S.W.3d 768 (2001). In addition, Mr. Miller testified that he asked Bryan if he understood the agreement and that Bryan said "yes." He also stated that he asked Bryan if he and Patricia had discussed the property each owned with the other, and Bryan said that they had. We note that Bryan has not identified any specific property of Patricia's that was not disclosed, nor has he identified anything about her financial situation of which he was unaware at the time he executed the agreement. We hold that the circuit court's decision finding the antenuptial agreement valid is not clearly erroneous.

Real Property in Florida

Bryan's second point on appeal is that the circuit court abused its discretion in awarding a lot in Florida to Patricia. On December 17, 1993, Bryan executed a warranty deed conveying a lot in Florida to Patricia. At the hearing, the parties disputed the reason for this

conveyance. Bryan contended that he conveyed the property to Patricia after his stroke in 1992 so that he would have no assets in his name in the event a malpractice judgment were ever entered against him. He said that he could not afford the insurance policy to cover such a judgment. He claimed that, while the lot would be Patricia's in name, his intent was, as between Patricia and him, that he would continue to own the lot. He stated that Patricia suggested the arrangement and that he assumed she had contacted Mr. Miller about preparing the deed.

Conversely, Patricia testified that Bryan gave the lot to her as a Christmas present and that they never discussed hiding his assets from potential judgment creditors. She also testified that she had paid all of the taxes, association dues, and additional expenses on the property since her receipt of the property in 1993. The circuit court found that there was no evidence enabling it to set the deed aside and therefore held that the lot would remain Patricia's property.

While the circuit court appeared to have difficulty determining exactly what prompted the conveyance of the Florida lot,¹ the circuit court did determine that there was no evidence allowing it to set the deed aside. The conflicting evidence was for the circuit court to resolve, and we hold that its ruling on this issue was not clearly erroneous.

¹On this issue, the court stated: "Although the Court is not satisfied as to what occasioned the deed to the Florida lot, the Plaintiff conveyed that lot to the Defendant over twelve (12) years ago. There is no evidence that would enable this Court to set that deed aside. Accordingly, the Florida lot shall remain the property of the Defendant, and she shall be solely responsible for any indebtedness owed thereon."

Alimony

For his final point on appeal, Bryan argues that the circuit court abused its discretion in denying his request for alimony. Specifically, he claims that Patricia's acquisition of real property in her own name after her marriage to Bryan created an economic imbalance which tilted in her favor, and thus the circuit court should have awarded him alimony. Patricia contends that alimony is not mandatory, but discretionary, and that the circuit court did not abuse its discretion in denying Bryan's request.

The decision whether to award alimony is a matter that lies within the trial judge's sound discretion, and we will not reverse the trial judge's decision to award alimony absent an abuse of that discretion. *Bailey v. Bailey*, ___ Ark. App. ___, ___ S.W.3d ___ (Dec. 6, 2006) (citing *Cole v. Cole*, 89 Ark. App. 134, 201 S.W.3d 21 (2005)). The primary factors that a court should consider in determining whether to award alimony are the financial need of one spouse and the other spouse's ability to pay. *Id.* A court may also consider other factors, including the parties' financial circumstances; the amount and nature of the parties' income, both current and anticipated; the extent and nature of the parties' resources and assets; and the parties' earning ability and capacity. *Id.*

In this case both parties testified that they kept their businesses and finances separate during the marriage. Patricia was disabled in an accident in January 1996. She testified that she had not practiced law since that time and, at the time of the hearing, was receiving \$4,860 per month in disability-insurance payments. These payments were expected to cease ten months after the hearing. The only additional income she received was \$1,390 in social-

security benefits. Patricia and her bookkeeper, Cheryl Chaney, testified that at the time of the hearing Patricia's income did not cover her expenses. While Patricia did acquire real property during the marriage, both Patricia and Ms. Chaney testified that Patricia made all of the mortgage payments on this property and that Bryan had never made any mortgage payments on any of the real property. Bryan did not dispute this testimony.

Bryan's affidavit of financial means reflected gross monthly income of \$2,135 and total monthly expenses of \$820.75. He testified at the hearing that he was living in an assisted-living facility that cost \$1,035 per month. He testified that this amount included all meals and utilities. He also testified that his medical care and prescription drugs were paid by the Veterans Administration.

The circuit court found that Patricia's disability income was not sufficient to pay her mortgage expenses and monthly living expenses. The court also noted that there was a limited time remaining on the disability policy. The circuit court further found that Bryan had income of approximately \$2,000 per month and expenses of less than sixty percent of that amount. Therefore, the court denied Bryan's request for alimony, finding that Bryan was considerably more financially sound than Patricia. We hold that the circuit court's decision not to award alimony in this case was not an abuse of discretion.

Affirmed.

GLADWIN and VAUGHT, JJ., agree.